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Supreme Court
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JAMES H. MCKEN

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

No. 1049 225.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

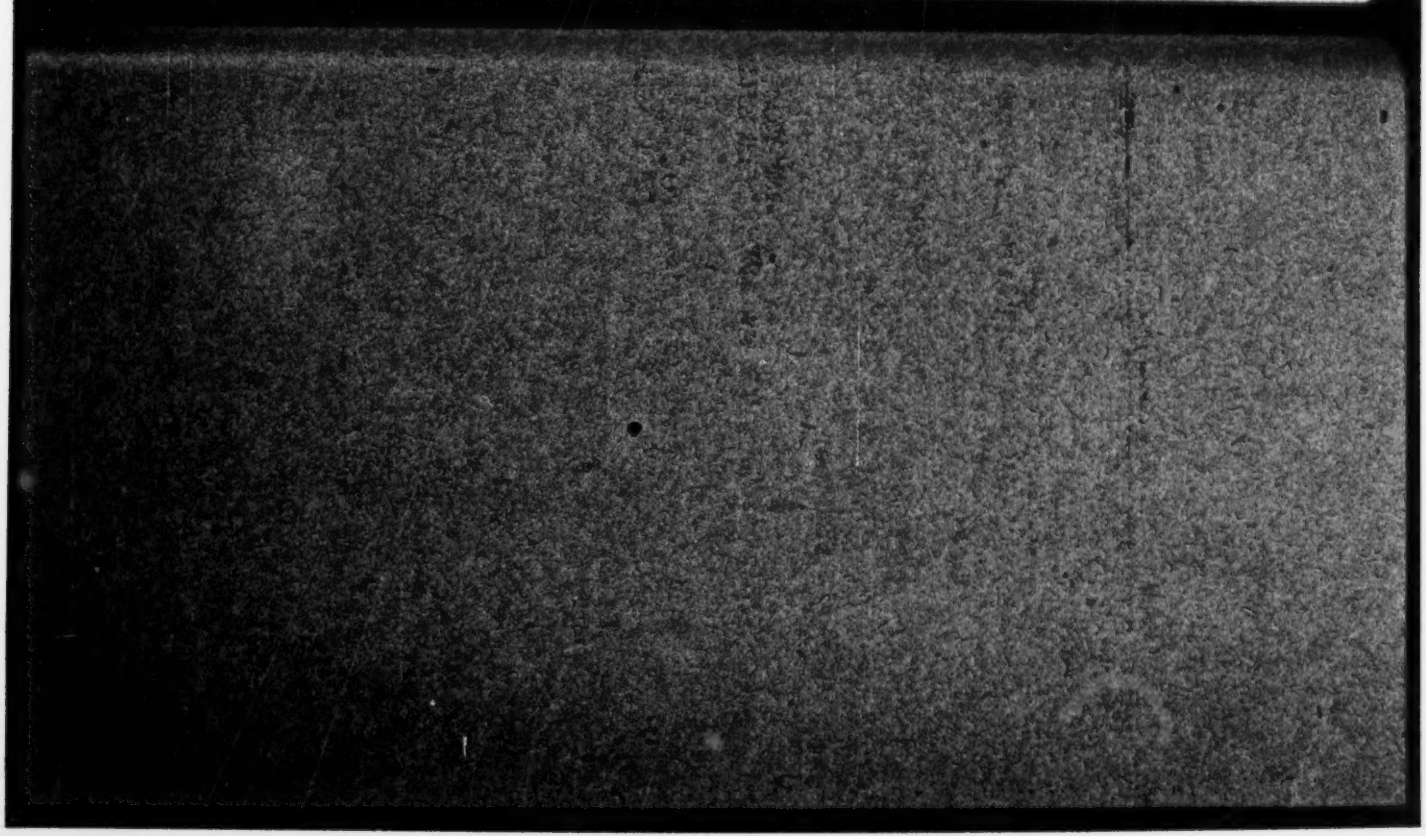
vs

THE WEST COAST NAVAL STORES COMPANY, RESPONDENT.

On Petition of The Louisville & Nashville Railroad Company for Writ of Certiorari to the Circuit Court of Appeals of the Fifth Judicial Circuit.

Brief of WILLIAM A. BLOUNT and A. C. BLOUNT, JR., Attorneys for Petitioner.

W. A. WEEKS, PRINTER, PENSACOLA.



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Attorneys for Petitioner.

We shall throughout this brief call the petitioner defendant, and the respondent, plaintiff, the position occupied by them respectively in the Circuit Court.

The plaintiff sued the defendant in the Circuit Court of the Northern District of Florida; the Court sustained the demurrer to the only plea filed by the defendant; the defendant declined to plead further and judgment was entered against it; it sued out writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which affirmed the decision of the Circuit Court and the defendant petitioned for this writ of certiorari to review and reverse that judgment.

The petition and the record herewith submitted are short and both contain copies of the declaration and plea, so that it is not necessary to repeat them all here, though we will hereafter set forth the plea. They will be found at pages three *et seq.* and ten *et seq.* of the record, and pages one *et seq.* and four of the petition, respectively.

The substance of the declaration is that the defendant was a railroad and common carrier of goods, and the owner of a wharf extending into the Bay of Pensacola, which wharf was used by defendant to convey goods from its railway, connecting therewith, to vessels lying thereat; that the plaintiff had been accustomed to so having its goods transported, for hire, for it over the said wharf to such vessels, but that before the suit the defendant refused to transport over its wharf the goods of plaintiff to be loaded on certain vessels, with the managers of which the plaintiff had contracted for the taking of such goods from said wharf to other ports to which the plaintiff intended to ship them, or to permit the plaintiff to use the said wharf so far as it involved the use of the said vessels in the shipment of plaintiff's goods.

The plea is best set forth verbatim, since the demurrer to it was sustained.

In the United States Circuit Court, Northern District of Florida.

West Coast Naval Stores Co.

vs.

Louisville & Nashville Railroad Co.

The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

1. That, the defendant has adequate depots and yards in the City of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter, nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereat of such vessels. That in accordance with such purpose, it made and promulgated, upon the construction of

said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company" (an agency of defendant), and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the City of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

That the defendant has not either notified plaintiff that

it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its Railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentionod in the declaration, to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant, itself, in its rail transportation aforesaid, to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers; That the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of the said wharf, one of the terminals of the defendant, by the said vessels; That the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such.

W. A. BLOUNT,
Attorney for Defendant

In our petition we have alleged that the decision of the Court below was erroneous and that there are special grounds in this case why this Court should review the decision and determine upon the sufficiency of the plea. We present the questions embraced in this allegation consecutively:

The Decision of the Court Below was Erroneous

We assume that this Court will examine the question of error only to the extent necessary to convince itself that the decision was not manifestly correct, but if it have doubt on the subject it will not solve that doubt upon the appli-

cation for this writ, but if the importance of the question, or any of the other reasons which under its decisions influence this Court in granting the writ, appear, it will postpone the solution of the doubt until the hearing of the case upon the return of the writ of certiorari.

This plea, in connection with the counts to which it is an answer, presents the important question whether a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to, and delivery at, a city on the seaboard, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight over such track for all persons alike and have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

We affirm this right and the plaintiff in error denies it.

The plaintiff in error rests its proposition upon the idea that the defendant is a common carrier; that as such, it must serve all alike; that its wharf was the wharf of a common carrier, and thus a public wharf, to which all vessels had a right of access to receive freight transported by defendant, and that it is a violation of such right to refuse to allow vessels selected by plaintiff in error to come to the wharf to receive freight.

The plaintiff's right, then, depends upon the right of vessels sought to be employed by it, for it is obvious that if they have no right to come, it has no right to demand that they come.

We rest our contention that the defendant has the right in dispute, upon the following propositions:

1. That the defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.
2. That one common carrier has not, independent of statute or contract, the right to use the terminals or like facilities of another carrier.
3. That this is peculiarly true as to another competing carrier.
4. And is specially applicable to wharf facilities.

The defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.

The plea, in connection with the declaration shows that the defendant is a common carrier as to freight brought to Pensacola for delivery at that point. There is nothing to show that it is a common carrier as to its wharf, or that such wharf is public.

As we understand the law, no corporation can be held as a common carrier as to any particular commodity, or any particular portion of its line or facilities, unless the obligation be imposed by its charter or by uniform usage attaching itself to like corporations, or by the holding of itself out as such carrier. If there be no charter obligation or if the usage with such corporations be not so fixed as to necessarily imply an assumption of such obligation by the acceptance of the charter, then the only way in which the many onerous obligations of the common carrier can be imposed is by the voluntary assumption of them by a holding out.

The plea expressly denies that there was any charter obligation to construct a wharf, and hence to devote it to the public.

There is no allegation that railroad companies building wharves at their termini usually throw them open to the public for use.

Then, the only resort of the plaintiff in error must be to the doctrine advanced by it in the Court below, that by the construction of the wharf and by the defendant's permission to certain vessels to use it upon certain terms and for certain purposes, a duty was imposed to permit all vessels to use it upon like terms and for like purposes.

This is tantamount to an assertion that if the defendant serves some at its wharf, it must serve all others in the same way; that is, impose upon itself the duties of a common carrier as to its wharf.

This ignores, however, the law that, independent of the statute or custom, the duty is measured by the extent of voluntary assumption; that is, that a corporation can hold itself out to the public as willing to serve it and every member of it just as far as it pleases, and its liability will be coextensive with such holding out. Thus: A railroad com-

pany may restrict itself to carrying passengers, as in the case of inter-urban trolley lines;

May decline to carry dogs:

Dickson vs. Great Northern Ry., L. R., 18 Q. B., 176.

Or coals:

Oxlade vs. N. E. R. R. Co., (No. 2,) 1 Nev. & Mac., 162: 15 C. B., N. S. 680;

Johnson vs. Midland Ry. Co., 4 Exc. (Welsby, Hurlstone & Gordon,) 367.

Or money:

Hosea vs. McCrory, 12 Ala., 349;

Whitmore vs. Steamboat "Caroline," 20 Mo., 513.

Or cattle:

Lake Shore, &c. vs. Perkins, 25 Mich., 329.

Or any other article of transportation which may be sufficiently differentiated from articles actually carried by it as to be reasonably put into a distinct class.

So, it may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities. The mere fact that they belong to it or are used by it in connection with transportation does not subject them to the common use of the public.

Its offices, side tracks, etc., are of the first class, and its turn-outs to private manufacturing enterprises on its lines are of the second class. It is clear that because they are used as the incidents of general transportation, or as media of transportation to one person, they are not thus subject to the use of the public. In fact, the existence of the facility for one person does not compel the furnishing of a like facility to another; that is to say, because one industry has a side track, another like industry cannot require the same facility.

People vs. Spruance, 57 Ill., 437.

These principles are applicable to the case at bar. The wharf was built without statutory compulsion, and without the existence of any duty to the public, and the defendant had a right to impress upon it such character as it saw fit; either to devote it to the public or to reserve it for its own private use, or to offer its facilities to such persons as it might select, upon such considerations as seemed to it best. It chose the latter course, and the public cannot complain,

for the choice lay with the defendant, and not with the public.

The question as to what imposes the obligations of a common carrier upon a corporation or person, has of course arisen most frequently in cases of tender of merchandise to be carried or of the failure of the carrier to carry safely after receipt, and a reference to the language of some of these cases will be instructive.

Justice Story says:

"The nature and extent of the employment or business which is authorized by the owners, on their own account and at their own risk, and which, either expressly or impliedly, they hold themselves out as undertaking, furnish the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort, is, What are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged?"

Citizens' Bank vs. Nantucket S. B. Co, 2 Story, 33.

Lindley, L. J. says:

"At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on these terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify."

Dickson vs. Great Nor. Ry. Co. 18 Q. B. D., 183, 184.

Lopez, J., says:

"Generally railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in a habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them."

Ib. 188.

Lord C. J. Cockburn says:

"Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodations to carry, on such goods being tendered to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition."

Garton vs. Bristol and Exeter R'y Co. 1 Best & Smith, 112, 162.

Parke, B. says:

"A person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."

Johnson vs. Midland R'y Co. 4 Ec. 267.

We might multiply indefinitely. The following epitomizes the doctrine as decided by the courts:

"And hence, it by no means follows, from the fact that the carrier is a common carrier, that he can be required to carry all kinds of goods. The word "goods" when used in defining his business, must be interpreted to mean such things as, from usage and custom, his mode of conveyance, his public professions, the character of his particular trade or the manner of conducting it, he is to be fairly understood as holding himself out to the public as ready to carry for hire."

Hutchinson on Carriers, p. 75.

According to the plea the defendant has held itself out

as a common carrier only to its depots at Pensacola and not to the end of its wharf.

* * * * * * * *

If, however, the defendant was a common carrier, it does not follow that it had no right to discriminate between vessels seeking to use its terminal facilities.

One common carrier has not, independent of charter or contract, the right to use the terminals of another carrier.

We may admit that in ordinary transportation the depot of delivery is a part of the common carriage, and that the shipper has a right to have it used for the purpose of delivery of the goods transported, but he has no right to use it himself, or to have any other than the transporting carrier use it. The transporter undertakes for itself the duty of transportation and delivery, but there is no obligation on it to permit the use of any of its facilities by another carrier, whether such facilities be its tracks or its terminals.

It must not unreasonably discriminate between persons for whom it carries, but its carriage being complete, it has the right to select the agency by which any further delivery is to be performed. The management of its own property, the right to protect its own interests, when not compelled by any rule of law to subordinate them to the interest of the public, require that it shall decide to whom the use of its property shall to any extent be committed, and with whom it will associate itself in the performance of its duties. These principles have been decided so many times that we content ourselves with calling attention to some of the decisions establishing them.

It will be remembered that the attempt of the plaintiff is to compel the defendant to permit vessels, other than those chosen by it, to continue the transportation begun by it, and in so doing to go alongside of, attach to, and avail themselves of the use of defendant's wharf.

The Supreme Court of the United States says:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract, and if

he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T., & S. F. R. R. Co. vs. Denver & New Orleans, &c., 110 U. S. Rep., 607.

In a case where the defendant refused to make with the complainant like traffic and billing arrangements as it made with a competitor (the Mallory Line) of the complainant, and the defendant was thereby practically refusing "to transact any business" with the complainant by and over defendant's wharf at Galveston, and the complainant asked that the defendant should be commanded "to afford to the complainant the same facilities, and accept freight upon the same conditions as by it extended or granted to other connecting steamship lines," *this court* adopted the language of the foregoing case and refused to hold that the defendant railway was, in doing as complained, violating any right, common law or other, of the complainant.

Gulf C. S. & F. Ry. vs. Miami S. S. Co. 86 Fed. 407, 416, 422.

The Circuit Court of Appeals of the Eighth Circuit holds that:

"An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating and loading, *and for the use of its tracks and terminals*, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same."

The court negatived the soundness of the contention,

"That when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend 'equal facilities' to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce."

And also the proposition that the court could,

"Put in force between two carriers an arrangement for

an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier."

Little Rock & M. R. Co. vs. St. Louis S. W. Ry. Co. 63 Fed. Rep. 775, 781.

The same decision had been made in the court below, in which Judge Williams said, referring to the result of previous decisions:

"These adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff railway for the exchange of interstate freight, with the consent of the defendants: Second, *that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is:* Third, that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company."

(The fourth proposition is not material here.)

Little Rock & M. R. R Co. vs. St. Louis I. M. & S. Ry. Co. 59 Fed. Rep. 404.

In the Circuit Court of the Western District of Missouri, the court decided:

"Neither public policy nor any legislation forbids a railroad company engaged in interstate commerce to make an exclusive contract with a carrier, whose route connects with and extends beyond that of such railroad company, for through billing and rating over the connecting lines, and by which such carrier is given the exclusive right to receive from the railroad company and forward freight destined to points beyond the line of such railroad."

In the opinion the court states both the effect of the interstate commerce law and of the common law, or public policy.

St. Louis Drayage Co. vs. L. & N. R. R. Co., 65 Fed. Rep., 39.

Justice Jackson says:

"It is left open to any common carrier to contract, or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."

Kentucky & I. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567–628.

Justice Field later approved and applied the same holding, adding:

"In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

Oregon Short Line, &c., vs. Northern Pac. R. R. Co. 51 Fed. Rep. 465, 475.

The Circuit Court of Appeals of the Ninth Circuit has held:

"A transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the third section of the interstate commerce act, to permit the boats of a competitor to land at such wharf."

Ilwaco Ry. & Nav. Co. vs. Oregon Short Line &c, 57 Fed. Rep. 673.

This case is instructive, though differing from the case at bar in detail, because the steamers with which the railroad company connected were under its control and a part of its line.

The law is the same in England. See as much in point:

Napier vs. Glasgow and Southwestern Ry. Co., 1 Nev. & Mac., 292.

In many of the federal cases above cited, reliance was had by the complaining party upon the third section of the interstate commerce act forbidding discriminations between

connecting lines, but the courts decided that the saving clause at the end, "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business," prevented the application of the preceding provisions as to discriminations. This proviso, however, was not the conferring of a new right upon the carrier, but the saving of pre-existing rights which might otherwise have been affected, and the decisions mentioned necessarily decided that neither the statute nor the common law restricted the right of the carrier to discriminate in the use of its terminal facilities between other carriers desiring to use them.

Against these authorities, the plaintiff in error was able in the court below to cite only two apparently in conflict—the cases of Indian River Steamboat Co. vs. East Coast Transportation Co., 28 Fla., 480, and the case of Oregon Short Line, &c. vs. Ilwaco, &c., 51 Fed. 611.

Of the former, it is only necessary to say that it was, whatever its general reasoning, justified by the statute of the state, mentioned in the opinion, which provided that no common carrier should "make any unjust discrimination in receiving freight from, or the delivery of freight to, any competing lines of steamboats in the state." Outside of this, the reasoning of the court (as remarked in 57 Fed. Rep. 676) is in conflict with the decision in the Express cases, 117 U. S. 29, and with the cases which we have heretofore cited.

It may be well to say that this statute had been repealed at the time of the occurrences mentioned in the declaration, and was not in force.

Even if it had been, it could not have affected this intrastate commerce:

Gulf C F. & S. R'y vs. Miami S. S. Co. 86 Fed. 420.

Of the other case, it suffices to say that it was reversed upon appeal in Ilwaco, &c. vs. Oregon, &c. 57 Fed. 673.

* * * * * * * *

The cases which treat of the right of a railway company to discriminate between draymen, hackmen, etc., desiring to use the depots and like facilities of a railroad, decide the principle of this case. While such decisions are in conflict, the vast weight of them is in favor of the right of the carrier to select from the persons desiring such facilities,

one or more with whom it can make arrangement agreeable to it, and refuse to permit the others the use of such facilities. These authorities are collected in Henry Donovan vs. Pennsylvania Co., decided by the Circuit Court of Appeals in the Seventh Circuit, 120 Fed. 215.

We have verified those holding with our contention as follows:

Jencks vs. Coleman, 2 Sumner, 221: 13 Fed. Cas. 442;
Barker vs. Midland R'y Co. 18 C. B. 46: 86 E. C. L. R. 45;
Beadell vs. Eastern Counties Ry. Co. 2 C. B. (N. S.) 509: 89 E. C. L. R. 509;
Painter vs. London etc. Ry. Co. 2 C. B. (N. S.) 702: 89 E. C. L. R. 701;
Barney vs. Oyster Bay Steamboat Co. 67 N. Y. 301;
Barney vs. D. R. Martin, 11 Blatch. 534: 2 Fed. Cas. 892;
Old Colony R. Co. vs. Tripp, 147 Mass. 35: 17 N. E. 89;
Commonwealth vs. Carey, 147 Mass. 40: 17 N. E. 97;
Fluker vs. Georgia Ry. Co. 81 Ga. 461;
Griswold vs. Webb, 16 R. I. 649: 7 L. R. A. 302;
Smith vs. N. Y. L. E. & W. R. Co. 149 Pa. St. 249: 24 Atl. 304;
N. Y. Cent. R. Co. vs. Flinn, 74 Hun. 124: 26 N. Y. Supp. 859;
N. Y. Cent. Ry. Co. vs. Sheeley, 27 N. Y. Supp. 185;
Brown vs. N. Y. Cent. Ry. Co. 75 Hun. 355; 27 N. Y. Supp. 69; 46 N. E. 1145;
Summit vs. State, 76 Tenn. 413: 41 Am. Rep. 637;
Lucas vs. Herbert, 148 Ind. 64: 37 L. R. A. 376;
N. Y. R. R. Co. vs. Scovill, 71 Conn. 136: 42 L. R. A. 157;
Kates vs. Cab Co. 107 Ga. 636: 46 L. R. A. 431;
Godbout vs. St. Paul Union Depot, 79 Minn. 188: 47 L. R. A. 532;
N. Y. Cent. R. Co. vs. Warren, 64 N. Y. Supp. 781;
Boston & Albany R. Co. vs. Brown, 177 Mass. 65: 58 N. E. 189;
Boston & Maine R. Co. vs. Sullivan, 177 Mass. 230: 58 N. E. 689;
N. Y. etc. R. Co. vs. Bork, 23 R. I.: 49 Atl. 965.

* * * * * * * *

It will be noted that the declaration of the plaintiff makes no case of discrimination against it or the public. It alleges that certain vessels with which it had contracted, were not allowed to come to the defendant's wharf, but it does not allege that it was hindered, delayed or prevented in the slightest degree by the failure of such vessels to come to the wharf or receive its goods for transportation, for there is no allegation that it was not able to ship with equal cheapness, expedition and convenience by other vessels coming to such wharf and destined to the same port. The non-existence of such vessels so destined is not stated. In short, plaintiff stands itself squarely upon the proposition that it had made a contract with certain vessels which necessitated the use by them of the defendant's wharf. Of course the defendant had nothing to do with such special contract. Its duty, if any, was to permit the plaintiff to ship by way of its wharf as cheaply, expeditiously and conveniently as it allowed others to ship. There is no negation in the declaration of the performance of this duty, while the plea expressly affirms it. As the case stands then, on the declaration and plea, the plaintiff and all other patrons of the road were served with exact equality, but there is no showing that the service which it would have received from vessels other than those contracted with by it would not have been the exact equivalent in every respect of those which it would have received from the vessels contracted with.

Then, the plaintiff has no cause of action unless it be law that it can sue for the deprivation of an alleged right of the vessels last mentioned, by which deprivation it has not been in the slightest injured,—a proposition which we imagine will not be asserted by it.

It is especially true that one COMPETING common carrier has not, independent of statute or contract, the right to use the terminals of another carrier.

A corporation by becoming a carrier does not put itself out of the pale of the application of ordinary business principles. Whatever justice there might be in compelling a carrier to devote its terminals upon equal terms to all the public when the interests of the public are coincident with, or, at least, not antagonistic to the carrier, there can be none in requiring it to devote a part of its facilities, con-

structed for its own use, to the benefit of an opponent, whose upbuilding must be at its expense, and such is not the law.

There is no common law which prohibits any and every discrimination; that prohibited is that which is unreasonable. It is needless to recapitulate the many instances of reasonable discrimination permitted, and it will suffice to say that among them is that which is required for a proper protection of its business interests against competition.

We might multiply authorities and instances, but we content ourselves with saying that the only federal case apparently contrary to our contention here was expressly put upon the ground that the steamship company was as to the railroad company "not a rival in its railroad business."

Oregon, &c. vs. Ilwaco, &c. 51 Fed 611.

And by saying that the right of a railroad company to discriminate to the extent of protecting itself is fully recognized by this Court in (among other cases,)

Tex. & Pac. R'y Co. vs. Interstate Com. Com'n. 162 U. S. 197.

It is also especially true that one common carrier has not, independent of statute or contract, the right to use the WHARF of another carrier.

The capacity of a wharf is necessarily limited. If many vessels desire its use, and it be open to all, waits for a berth would be frequent. By reason of the freedom of the wharf, the first vessel coming must be the first served. Regularity and certainty of access will be impossible. Each wait entails a loss, and a succession of losses means an abandonment of the use of the wharf and of the trade which is possible only by such use. Thus, the very freedom becomes the cause of its disuse and failure to accomplish the purpose of its creation.

A public wharf at the terminus of a railroad which is part of a large export or import business is an impossibility. The right of free resort by all vessels produces conditions which kill the business itself. The sea carriage of to-day is done in steam vessels, and an essential of their success is certainty of dispatch. This cannot be secured if a chance comer or Ishmaelite has the right to a berth from which the regular liner must be excluded until a vacancy occurs.

The liner ceases to be a liner because there is no line, it being driven out of existence by the certain losses resulting from the delays and hindrances at the wharf. The business of the railroad company is destroyed, the public suffers, and the only temporary gainer is the sporadic vessel, which, in turn, is forced to withdraw because of the want of traffic connections with the railroad company and of profit in the business.

At this time, no successful exporting and importing business by sea can be done without the closest co-operation between the railroad taking the merchandise to and from the seaboard and the steamers taking it to and from foreign ports. Each must be informed definitely of the movements of the other, and each must co-operate with the other. Cargoes to be shipped must be collected from different points in the interior and transported to the seaboard. These collections must be more or less simultaneous, and must ordinarily precede but little in time the arrival and readiness of the steamer to load the cargoes collected. A want of coincidence between the arrival of the steamers and the cargoes means delay and loss to the railroad company or the steamer. Such want may result from a failure of the steamer to notify the railroad company of its prospective arrival, or of the railroad company to provide cargo with the requisite expedition and fullness. A failure of the steamer to secure her berth promptly, entails a loss on both.

The necessary co-operation and harmony can be secured only by business connections between the one and the other. In such case, the railroad company can arrange in advance for the cargoes and berthing of the incoming steamer, and the steamer by timely notice and effort can prevent delay to the shipper and railroad carrier.

This would be impossible if the race for the wharf facilities be free for all, for in such a race, all system, regularity and certainty is lost, and the resultant chaos is synonymous with loss to all concerned.

The uncertainty of arrival and departure prevents the proper collection of freights by the railroad company, the certain delays destroy the profits of the steamship lines, the occasional user cannot, because of the breaking down of the business of the railroad company, obtain the proper freight accommodations, even if the railroad carrier be dis-

posed to give them, and the public stands between the upper and nether mill-stones, and sees its business interests annihilated by the fantasy of a public wharf.

It is evident, too, that no good can accrue to lines of steamers only from the right to physical connection with the wharf. As we have seen, it is well settled in the federal courts that traffic connections and co-operation cannot be forced upon an unwilling carrier; and yet, without them, the right to use the wharf would be practically barren of results, for the procurement of cargoes, the arrangement for shipping them, etc., are absolutely necessary to successful shipments of products to be brought by railroads to the sea for shipment.

Besides, the railroad itself has rights. Because it is a common carrier, it is not deprived of the right to apply sound business principles to the workings of its various departments. No common law or public policy requires that for a fanciful equality of service, it should sacrifice its interests as well as the interests of the public. Discriminations have always been held justifiable when not unreasonable and unjust, taking into consideration the several interests to be affected, and no court has ever held that it is reasonable to require a carrier to sacrifice any branch of its business in order that strict equality may be produced, especially when such equality must infallibly injure the public.

The very nature of a wharf and its inadequacy to meet the demands of every incoming vessel, necessitates that its use shall be exclusively for those with whom the carrier enters into arrangements. The carrier has the right to select a strong connection instead of a weak one—one able to give assurance of permanent business, instead of one which can offer only occasional shipments. If the free use is incompatible with the certain, regular use by a steamer or lines of steamers with which the carrier is aligned, it seems too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former.

An illustration or two will suffice:

The Pennsylvania Railroad Co. has docks in Jersey City for the reception and discharge of passengers on its line. It has at present ferry boats belonging to itself, bringing and taking passengers to and from the New York

side of North River. If, however, it only had a contract with an independent line of ferry boats to perform this service, could an outside boat insist that it, too, had a right to bring passengers and claim a berth at the dock for their discharge, and insist that the regular boats employed by the company should wait until the berth was vacated by it? What would become of the regularity of schedule and service which the public has a right to require, and from which the railroad company has a right to make a profit? And when the interloper has succeeded in driving the regulars off, how would the public be served? Other contracts for regular service could not be obtained because of the liability to interruption and consequent destruction of profits, and the public would not be served at all.

To make the query exactly applicable to this case: Would, in the event supposed, a passenger who came from Philadelphia to Jersey City over the railroad company's lines, have a right to insist that a ferry boat to be selected by him should be allowed to come into the railroad company's slips in order to ferry him across, even though it delayed and excluded the regular ferry boat, and in case that the railroad company refused to permit such access to such outside boat, to bring suit against such company for such refusal to let such outside boat have the use of its terminal facilities?

Without particularizing further, what would become of the export and import business of the country if the steamship wharves in New York City, Philadelphia, Boston, Baltimore, New Orleans, etc., etc., to which the ocean liners have a right by contract to come, should be open to every tramp steamer desiring to use them, and the liners be liable at any time to find their berths occupied indefinitely by one or more steamers prior in point of arrival, and they be thereby cut off from their usual rail or other connections necessary for the distribution of the freight brought by them?

There can be but one answer to a proposition which involves such consequences.

The principles governing this branch of this case are well set forth by the Supreme Court of the United States showing the impossibility where facilities of the carrier are limited, of affording such facilities to other common carriers without regard to the interests of the carrier itself or of the

public. The decision mentioned was in the Express cases, where the court declined to hold that a railroad company was compelled to furnish express facilities to any express company desiring the use of its trains. Its language may be almost inserted bodily into the facts in this case by substituting the word "wharf" for "train," and the word "vessel" for "express companies." The language is as follows:

"The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

Express Cases, 117 U. S. 1 and 24.

See also:

C. St. L. & N. O. R'y Co. vs. Pullman S. Car Co. 139 U. S. 79.

And in a case where the Judge refused to compel a railroad company to employ a particular transfer company, and decided that it had the right to select such transfer company as it might see fit as its connecting carrier, the court used the following language particularly applicable to the case at bar:

"To this end it was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries. It could not foresee how long it would be before the railroad company, in such dependence might find itself a prey to a 'combine' among the transfer companies, or become exposed to the not improbable contingency of a rivalry between competing companies, which would break both down, leaving the railroad company without a certain reliable connection with the city. It would be harsh, unreasonable, and questionable legislation that would deny to the common carrier the protection of a provident, reliable contract, like the one in question."

St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39, 42.

Special Grounds for the Petition.

First:

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court.

There is no original reasoning indulged in by the Circuit Court of Appeals, but it contents itself with citing and quoting from a case in the Supreme Court of Florida and a case in the Supreme Court of Washington to sustain its holding and we must look to these quotations to determine the grounds upon which the Circuit Court of Appeals based its decision.

The doctrine of the Florida case, as adopted by the Court below, is, as stated by itself, that a railroad corporation owning a wharf in a navigable stream

and having tracks thereon "has no right to lease the terminal point of its railroad tracks and terminal facilities on a navigable stream to a steamboat company and, thereby, defeat the ingress and egress to and from said railroad tracks on the part of other competing lines of steamboat companies." (Indian River Steamboat Company vs. East Coast Transportation Company, 28 Fla. 387.)

And again, "if it be competent to sustain such a contract (*i. e.* a contract permitting one boat to use its wharf and excluding another from such use) the common carrier can select one connecting line of boats and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly and the sanction of an unfair and unjust preference between connecting and competing lines of transportation."

As we understand the decisions of this Court, the carrier has just such power of discrimination and preference. The doctrine of this Court is:

"At common law, a carrier is not bound to carry except on its own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T. & S. F. R. R. Co. vs. Denver & New Orleans, &c., 110 U. S. Rep. 607.

And the right of discrimination between competing lines of transportation is distinctly recognized by this Court in the case where it is held that a railroad company may welcome one and exclude another express company.

Express Cases, 117 U. S. 1 & 24.

In this case the Court says:

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public

at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

The same idea is embraced in the case of Chicago & St. L. & N. O. Ry. Co. vs. Pullman Car Co. 139 U. S. 79, where the Court says:

"The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them."

It will be noted that in the declaration in the instant case there is no allegation that the public, or the plaintiff as one of the public, has not been fully served in the facilities provided by the defendant for the transporting of exports from the end of its line (its wharf,) to the unnamed ports mentioned in the declaration, to which the plaintiff desired to ship. In view of this we think it unnecessary to discuss the question as to whether there is any obligation upon a railroad company to provide facilities for transportation beyond the end of its line.

The power of discrimination by railroad companies against other carriers, when necessary or expedient for the subserving of its own interest, or that of the public, is fully set forth in the opinion of this Court in,

Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 218, *et seq.*

The case of Barrington vs. Commercial Dock Co. (Wash.) 45 Pac. 748, is, if in point, directly opposed to the principles enunciated, as above, by this Court.

It is, however, not in point, for it merely determines that a wharf unconnected with a railroad, and in no sense one of

its terminals, cannot be partially without being wholly thrown open to the use of the public. It does not, and could not, touch upon and decide the larger question, in this case, as to the relations of carriers to each other; the control of one carrier over its terminals to the exclusion of another; the right of one carrier to make transportation arrangements with one connecting carrier without being compelled to make like arrangements with every other carrier, and the right of a carrier with limited facilities like a wharf, to so regulate the use of that wharf as to best protect itself and the interests of the public.

The only suggestion made by the Circuit Court of Appeals not extracted from the opinions in the cases in the Supreme Courts of Florida and Washington, is that, if the wharf in question "was used by the railroad company solely for its own carrying business, in connection with its own lines, a different case would be presented." This view is in direct opposition to the opinions in this Court, that a carrier "puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T. & S. R. R. Co. vs. Denver & N. O. &c., R. R. Co. 110 U. S. 680.

And that if a carrier affords all reasonable accommodation it "owes no duty to the public as to the particular agencies it shall select for that purpose."

Express Cases, 117 U. S. 1 & 24.

Second.

The decision of the Court below is contrary to the decisions of other Circuit Courts of Appeal and United States Circuit Courts in other Circuits.

These cases are:

(C. C. A. 8th Circuit)—Little Rock &c. vs. St. Louis &c. Ry. Co. 61 Fed. 775–781;

(C. C. A. 9th Circuit)—Ilwaco Navigation Co. vs. Oregon Short Line &c. 57 Fed. 673;

Justice Jackson—Ky. & I. Bridge Co. vs. L. & N. R. R. Co. 37 Fed. 567–628;

Justice Field—Oregon Short Line vs. Northern Pac. R. R. Co. 51 Fed. 465–475;
Judge Williams—Little Rock & M. R. R. Co. vs. St. Louis &c. 59 Fed. 404;
Judge Phillips—St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39.

It would be a useless repetition to set out the facts and decisions in these cases. They are commented on in preceding pages of this brief (pp. 11-14) and to that comment we refer.

Third.

The decision of the Court below is also in conflict with the decisions of the English Courts and the highest State Courts of Appeal of this country, in that it ignored the right of a carrier, in the absence of statute or charter requirements, to assume the obligations of a common carrier as to such commodities and such businesses as it may see fit, and to discriminate between other common carriers in the use of its terminal facilities. The authorities are already set forth herein on pages 6 to 10 of this brief.

Fourth and Fifth.

The question involved is of national importance and of international importance, in that it vitally concerns the largest businesses in the country and in every section of the union, and in that all the foreign export and import business of the country is done from wharves. It would be but repetition to place here what we have heretofore said upon this subject in this brief on pages 17 to 20, and we refer to those pages as an elaboration of this sub-division of our brief.

We respectfully submit that the reasoning of authorities which we have set forth above show that the Court below erred and that the question is of such special importance that this Court should review the decision of that Court.

Respectfully submitted,

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